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E.O. 11652: GDS
TAGS: EINV, OECD, UNCTAD
SUBJECT: TRANSFER OF TECHNOLOGY - OECD AD HOC POLICY GROUP ON MULTLNATIONAL ENTERPRISES (JANUARY 11-13).

1. SUMMARY. THE OECD AD HOC POLICY GROUP ON MULTINATIONAL ENTERPRISES, COMMITTEE ON SCIENCE AND TECHNOLOGY POLICY (CSTP), MET AT OECD JANUARY 11-13, 1978, TO PREPARE THE GROUP B POSITION FOR THE FEBRUARY MEETING OF THE UNCTAD INTERGOVERNMENTAL GROUP OF EXPERTS (IGE) ON THE INTERNATIONAL CODE OF CONDUCT FOR THE TRANSFER OF TECHNOLOGY. DISCUSSIONS WERE HELD ON THE CHAPTERS ON PRINCIPLES AND 0BJECTIVES, NATIONAL REGULATION, INTERNATIONAL COLLABORATION, RESTRICTIVE BUSINESS PRACTICES (RBPS), AND RESPONSIBILITIES OF ENTERPRISES. IN ADDITION, A SWEDISH PAPER ON POSSIBLE INTERNATIONAL MACHINERY AND A US WORKING PAPER ON THE CHAPTER ON
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APPLICABLE LAW AND SETTLEMENT OF DISPUTES WERE INTRODUCED; A NEW CHAPEAU FOR THE RBP CHAPTER WAS ADOPTED AD REFERENDUM. FINALLY, THE GROUP HAD LONG DISCUSSION ON ISSUE OF LEGAL NATURE OF THE CODE. GROUP GENERALLY SUPPORTED OECD SECRETARIAT PROPOSAL THAT AD HOC POLICY GROUP BE REGULARIZED AS A PERMANENT INSTITUTION. SECRETARIAT (DE LORME) NOTED THAT APPROVAL OF SUCH A

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MEASURE WOULD BE REQUESTED AT THE FEBRUARY MEETING OF THE COMMITTEE ON SCIENCE AND TECHNOLOGY POLICY (CSTP) END SUMMARY.

2. ASSESSMENT: B GROUP EXPERTS GENERALLY CONCLUDED THAT LAST INTERGOVERNMENTAL EXPERTS GROUP MEETING, (OCTOBER 31-NOVEMBER 11), PRODUCED PROGRESS, ALBEIT LIMITED, ON LESS CRITICAL ISSUES SUCH AS SPECIAL TREATMENT FOR DEVELOPING COUNTRIES. WHILE MANY BELIEVE G-77 WILLING TO NEGOTIATE ON MINOR QUESTIONS, CONSENSUS OF EXPERTS IS THAT PROSPECTS FOR ADOPTION OF A CODE AT THE CONFERENCE SCHEDULED FOR OCTOBER-NOVEMBER, 1978, ARE DIM. THERE APPEARS TO BE GROWING ACCEPTANCE WITHIN B GROUP OF A PHASED CONFERENCE FOCUSING ON SELECTED ISSUES. (FRG DELEGATE INFORMED USDEL PRIVATELY THAT HIS GOVERNMENT IS PREPARED TO SUPPORT A CONFERENCE IN OCTOBER LIMITED TO THOSE ISSUES OR CONFLICTS ON WHICH WE ARE CLOSER TO AGREEMENT).

3. ON SUBSTANCE, CONSENSUS ON ISSUES HELD UP RELATIVELY WELL BUT GROUP'S COHESION -- PARTICULARLY BETWEEN FINNISH-NORWEGIAN DELEGATIONS AND THE REST OF B GROUP -- CLEARLY IS COMING UNDER INCREASING STRAIN. EXPERTS GENERALLY REAFFIRMED STANDING POSITIONS ON LEGAL NATURE OF CODE, APPLICATIONS AND GUARANTEES, AND REACHED TENTATIVE REVISIONS, SATISFACTORY TO USDEL, ON CHAPTERS
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DEALING WITH PRINCIPLES AND OBJECTIVES, AND INTERNATIONAL COLLABORATION. HOWEVER, SOME DELEGATIONS (E.G., NORDICS, ITALIAN) SHOWED SOME WILLINGNESS TO CONSIDER THE POSSIBILITY OF A SO-CALLED ZEBRA CODE, WITH MOST PROVISIONS VOLUNTARY BUT SOME (PERHAPS INTERNATIONAL MACHINERY) MORE OBLIGATORY. THUS, THE ISSUE IS BOUND TO COME UP AGAIN. BEFORE NEXT IGE (FEBRUARY 13-24), USG WILL NEED TO CONSIDER SWEDISH PROPOSAL FOR A LIMITED INSTITUTIONAL MECHANISM TO FOLLOW UP THE CODE (PARA 7 BELOW), AS WELL AS TO REVIEW CAREFULLY THE NEW RBP CHAPEAU ADOPTED AD REFERENDUM BY THE EXPERTS.

4. PRINCIPLES AND OBJECTIVES: B GROUP EXPERTS REVISED CHAPTER ON PRINCIPLES AND OBJECTIVES BASED ON A "COMPROMISE" PRESENTED BY JAPANESE CHAIRMAN OF IGE'S

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WORKING GROUP I. RESULTS GENERALLY SATISFACTORY, BUT THUS FAR FAIL TO REFLECT ONCE CLEAR DISTINCTION BETWEEN A PRINCIPLE AND AN OBJECTIVE. USDEL REPEATEDLY EXPRESSED CONCERN ON THIS POINT; QUESTION WILL BE ADDRESSED IN GENEVA DURING NEXT IGE. AFTER HEATED DEBATE, US SUCCEEDED IN REPHRASING A PREVIOUSLY AGREED OBJECTIVE WHICH WE HAVE LONG BELIEVED PREJUDICIAL TO US POSITION FAVORING A VOLUNTARY, NON-BINDING CODE. DEBATE FOCUSED ON ISSUES OF MAJORITY VERSUS UNANIMOUS B GROUP POSITIONS AND RIGHT OF A DELEGATION TO RESERVE ON LANGUAGE PREVIOUSLY ADOPTED AD REFERENDUM. (NOTE: IT IS CLEAR THAT IN FUTURE DRAFTING, EVEN OF TENTATIVE AD REFERENDUM TEXTS WITHIN THE B GROUP, GREAT CAUTION WLL BE REQUIRED TO AVOID NEED FOR SUBSEQUENT RESERVATIONS AND CLAIM OF BAD FAITH).

5. NATIONAL REGULATION: B GROUP GENERALLY AFFIRMED
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CURRENT APPROACH LINKING DETAILS OF REGULATIONS TO GENERAL PRINCIPLES ADDRESSED TO GOVERNMENTS IN IMPLEMENTING SUCH LEGISLATIONS. IN THIS LIGHT, DEVELOPED COUNTRIES EXPERTS DECIDED, FOR NEGOTIATING PURPOSES,

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TO ADJUST A "COMPROMISE" PRESENTED BY INDIAN CHAIRMAN OF THE IGE'S WORKING GROUP III AS A BASIS FOR FUTURE DISCUSSION, SUBJECT TO SUBSTANTIAL REVISIONS AT THE NEXT UNCTAD SESSION.

6. INTERNATIONAL COLLABORATION: EXPERTS CONSIDERED AND FURTHER REVISED A SWEDISH PROPOSAL IDENTIFYING AREAS APPROPRIATE FOR INTERNATIONAL COLLABORATION. RESULT IS A MILDLY-WORDED DOCUMENT WHICH LIMITS SCOPE OF COLLABORATION AND PROVIDES STATES WITH THE OPTION OF WORKING BILATERALLY OR MULTILATERALLY.

7. A SEPARATE NEW SWEDISH PROPOSAL FOR FOLLOW-UP MACHINERY IN UNCTAD WAS ALSO DISCUSSED. THE PROPOSAL CALLS FOR AN EXPERTS GROUP OF THE UNCTAD TECHNOLOGY TRANSFER COMMITTEE TO GATHER INFORMATION "FROM THE PARTIES" ON THE CODE'S "APPLICATIONS" AND TO PREPARE REPORTS. DELEGATES WILL CONTINUE DELIBERATIONS AT NEXT IGE BUT MANY, INCLUDING USDEL, ASKED HARD QUESTIONS ABOUT THE SPECIFICS OF THE PROPOSED GROUP.

8. RESTRICTIVE BUSINESS PRACTICES (RBPS). IN A SEPARATE WORKING GROUP ON RBPS AND RESPONSIBILITIES OF ENTERPRISES, DEVELOPED COUNTRIES EXPERTS AGAIN ADDRESSED THE EXTREMELY DIFFICULT ISSUE OF DRAFTING AN ACCEPTABLE CHAPEAU AND EXCEPTIONS FOR THE CHAPTER ON RBPS. BASED ON THE COORDINATOR'S DRAFT PREVIOUSLY SUPPLIED TO MEMBERS OF THE GROUP, PROTRACTED DISCUSSIONS WERE HELD ON WHETHER TO INCLUDE CERTAIN EXCEPTIONS IN THE LIMITED OFFICIAL USE

PREAMBLE OR TO WRITE A SEPARATE SECTION THEREON. AFTER ANALYSING THE PROPOSED PROVISIONS, IT WAS DECIDED NOT TO PROPOSE, FOR TIME BEING, AN EXCEPTION DEALING WITH DECISIONS BY NATIONAL AUTHORITIES ON APPLICABLE LAWS. IT WAS FELT THAT THIS EXCEPTION MIGHT PREJUDICE THE DECISION ON THE LEGAL NATURE OF THE CODE. ALSO IT WAS FELT THAT OTHER CHAPTERS OF THE CODE SIMILARLY MIGHT NEED CERTAIN EXCEPTION AT A LATER POINT IN THE NEGOTIATIONS; A GENERAL EXCEPTION PLACED NEAR THE END OF THE ENTIRE CODE MIGHT THEREFORE BE A MORE APPROPRIATE LOCATION.

9. AFTER DISCUSSING THE EXCEPTION DEALING WITH INTRA-CORPORATE TRANSFERS IT WAS DECIDED TO INCLUDE SUCH EXCEPTIONS IN THE PREAMBLE ITSELF. AFTER ARDUOUS NEGOTIATIONS ON THE ACTUAL WORDING OF THE EXCEPTION, THE DELEGATES, US INCLUDED, ADOPTED THE FOLLOWING PREAMBLE ON AN AD REFERENDUM BASIS AND EXPRESSED THEIR HOPES THAT THIS VERSION WOULD FINALLY BE ACCEPTED BY THEIR

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RESPECTIVE GOVERNMENTS FOR THE PURPOSE OF TABLING THE PREAMBLE AT THE NEXT IGE MEETING IN FEBRUARY:
BEGIN TEXT: "PARTIES TO TECHNOLOGY TRANSFER TRANSACTIONS SHOULD REFRAIN FROM THE FOLLOWING RESTRICTIVE BUSINESS PRACTICES IN LICENSING PATENTS OR KNOW-HOW, OR TRADE-MARKS ASSOCIATED WITH PATENTS OR KNOW-HOW, WHERE SUCH PRACTICES WOULD ADVERSELY AFFECT THE DEVELOPMENT OF THE

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RECIPIENT COUNTRY BY UNREASONABLY RESTRAINING TRADE OR THE TRANSFER OF TECHNOLOGY, RECOGNIZING THAT THE REA-SONABLENESS OF EACH PRACTICE SHOULD BE EVALUATED ON A CASE BY CASE BASIS SUBJECT TO THE JUSTIFICATIONS AND EXCEPTIONS SET FORTH IN THE CLAUSES DEFINING THE PRACTICES, AND RECOGNIZING THAT RESTRICTIONS FOR THE PURPOSE OF RATIONALIZATION OR REASONABLE ALLOCATION OF FUNCTIONS WITHIN A GROUP OF AFFILIATED ENTERPRISES, NOT AMOUNTING TO AN ABUSE OF A DOMINANT POSITION OF MARKET POWER WITHIN THE RELEVANT MARKET, SUCH AN UNREASONABLE RESTRAINT OF THE TRADE OF A COMPETING ENTERPRISE, SHOULD NORMALLY BE CONSIDERED NON-OBJECTIONABLE". END TEXT.

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10. DISCUSSIONS WERE ALSO HELD ON CLARIFYING CERTAIN POSITIONS IN SEVERAL OF THE RBP PROVISIONS WHICH PRESENTLY APPEAR AS BRACKETED TEXTS OF ALL THREE COUNTRY
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GROUPS. IN ADDITION, THE SIX RBPS PROPOSED SOLELY BY THE G-77 AND GROUP D WERE ANALYZED WITH THE CONCLUSION THAT THESE RBPS WERE EITHER ALREADY COVERED OR COULD BE COVERED ELSEWHERE OR WERE NOT APPROPRIATE IN THE CHAPTER AS SEPARATE RBPS. AS A CONSEQUENCE, IT WAS DECIDED TO OPPOSE THESE CLAUSES WITHOUT OFFERING ANY SEPARATE PARALLEL TEXT.

11. RESPONSIBILITIES: THE CHAPTER ON RESPONSIBILITIES OF ENTERPRISES WAS BRIEFLY DISCUSSED AND THE CONCLUSION WAS REACHED THAT IN LIGHT OF GROUP D'S AND G-77'S PROFESSED INTENTIONS TO TABLE A REDRAFT ON THEIR OWN PROPOSED CHAPTERS, THE TIME FOR ANY MODIFICATION OF GROUP B'S POSITION HAD NOT YET COME. THE POSSIBILITY OF A PREAMBLE FOR THIS CHAPTER WAS ALSO RAISED. IT WAS DECIDED, HOWEVER, THAT THIS SUBJECT SHOULD ALSO AWAIT FURTHER DEVELOPMENTS OF THE SPECIFIC PROVISIONS IN THE CHAPTER BEFORE ANY CONCRETE PROPOSALS BY GROUP B WERE PUT FORTH.

12. LEGAL NATURE DISCUSSION: THE GROUP FINALLY HAD A FAR-RANGING DISCUSSION ON THE IMPLICATIONS OF A BINDING OR A NON-BINDING CODE. THE SWISS DELEGATE (ROETHLISBERGER) SUMMARIZED THE IMPORTANT POINTS AS FOLLOWS: (1) THE 0CTOBER CONFERENCE WILL HAVE A DUAL FUNCTION - TO DECIDE THE LEGAL NATURE, AND TO RESOLVE THE SUBSTANTIVE DIFFERENCES; (2) THE CODE SHOULD ACTUALLY BE APPLIED BY GOVERNMENTS AND ENTERPRISES; (3) GOVERNMENTS MUST DECIDE WHETHER THIS EXERCISE IS FUNDAMENTALLY A NORTH/SOUTH MATTER, IMPLYING THE NECESSITY OF MAKING CONCESSIONS TO THE G-77, OR ALTERNATIVELY, IF IT SHOULD BE VIEWED IN CONNECTION WITH AREAS SUCH AS COMMODITIES AND ENERGY, WHERE THE G-77 HAVE REFUSED TO BE FORTH-
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COMING; (4) THE THREE OPTIONS ON LEGAL NATURE ARE COMPLETELY VOLUNTARY, COMPLETELY BINDING, OR "ZEBRA" (I.E., MIXED); (5) SWITZERLAND FIRMLY SUPPORTS A VOLUNTARY CODE NOW, AND IF THE CONFERENCE DECIDES ON A BINDING DOCUMENT, IT WOULD PROBABLY BE NECESSARY

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TO RE-EXAMINE EVERYTHING. THE REST OF THE DISCUSSION FOLLOWED THESE POINTS. DIFFERENCES IN OPINION ON THE THIRD POINT ESPECIALLY WERE APPARENT, WITH THE NORDICS PREDICTABLY INTERESTED IN CONCESSIONS, AND THE US, UK, AND SWITZERLAND TAKING A HARDER LINE. THE JAPANESE DELEGATE (KUNUGI) WILL PREPARE A PAPER USING THE INTERNATIONAL LABOR STANDARDS AS A MODEL. HIS PROPOSAL WAS UNCLEAR, BUT APPARENTLY THE SECTIONS ON MACHINERY AND DISPUTE SETTLEMENT WILL BE MORE OBLIGATORY THAN THE OTHER SECTIONS.
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